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Tan Sri Dato' Professor Dr Lim Kok Wing v Thurai Das a/l Thuraisingham & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO D25NCC-8 OF 2010
ABDUL AZIZ ABDUL RAHIM J
13 APRIL 2011

Arbitration — Arbitrator — Revocation of appointment — Whether challenge to arbitrator's fitness to act made in accordance with s 15 of the Arbitration Act 2005 — Challenging arbitrator's fitness to act in first arbitration proceedings due to his appointment as arbitrator in second arbitration proceeding — Failure to send statement of reasons for challenge to arbitral tribunal — Failure to attended proposed preliminary meeting arranged by arbitrator — Whether arbitrator in first proceeding likely to be influenced by events or evidence taking place in second proceeding — Whether there was evidence of arbitrator being biased or lacking independence — Arbitration Act 2005 ss 11, 13(6), 15 & 18(1)

Two arbitration proceedings were commenced before the same arbitrator ('the first respondent'). The first arbitration proceeding ('the first proceeding') was by the second respondent against the applicant. The second arbitration proceeding was by ATSA Architect Sdn Bhd ('the architect') against the applicant ('the second proceeding'). In the first proceeding, the second respondent claimed for payment for a contract work done for the applicant. In the second proceeding, the architect claimed for its professional fees for services rendered to the applicant for the said contract work. The architect's solicitors had without consultation or approval of the applicant, written to the Director of Kuala Lumpur Regional Centre for Arbitration ('KLRCA') to appoint an arbitrator purportedly pursuant to s 13(6) of the Arbitration Act 2005 ('the Act'). The applicant then informed KLRCA that there was no agreement whatsoever between the applicant and the architect to arbitrate the matter in the second proceeding as mandated under s 29(i) of the Architects Act. The applicant also informed KLRCA that the architect was a key witness and was directly involved in the first proceeding. KLRCA however did not respond to the applicant's letters and proceeded to appoint the first respondent without the applicant's knowledge. The first respondent then filed his statement of independence but did not declare his involvement in the first proceeding. When the Director of KLRCA wrote to the applicant informing the applicant that the first respondent had been appointed as arbitrator, the applicant immediately responded and wrote to the Director of KLRCA objecting to the appointment. Again there was no reply from KLRCA. The applicant later filed

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this motion pursuant to ss 11 and 15 of the Act to remove the first respondent as arbitrator from the first proceeding.

Held, dismissing the plaintiff's application with costs:

(1) For the court to consider whether there is justifiable basis to remove an arbitrator, there must first be a challenge to the arbitrator's fitness to act as one. The challenge must be made in accordance with the provision of s 15 of the Act. More importantly under s 15(1) of the Act, a statement of the reasons for the challenge must be sent to the Arbitral Tribunal. In this case, there was no challenge to the appointment or fitness of the first respondent in the first proceeding. All the evidence showed was that the applicant was unhappy that the first respondent had been appointed as the arbitrator in the second proceeding. Thus, the complaint was about the first respondent being arbitrator in the second proceeding and not the first respondent's fitness to arbitrate in the first proceeding. It was for the Tribunal to decide on the challenge. In the absence of such challenge, there was no basis for this application. Hence, the application was misconceived (see paras 21–22).

(2) The applicant's complaint was that there was no agreement for arbitration between the applicant and the architect in the second proceeding. If that was so, then having regard to the provision of s 13(6) and read with s 15(2) and s 18(1) of the Act, the applicant should have sent a written statement to the arbitrator and attended the proposed preliminary meeting arranged by the arbitrator so that the issue could be decided by the arbitrator. This was not done by the applicant. Instead, the applicant raised the complaint of the appointment of the first respondent in the second proceeding by writing letters to KLRCA and Pertubuhan Arkitek Malaysia. This approach was not the correct approach to challenge the appointment or fitness of the first respondent to act as arbitrator in the first proceeding (see para 25).

(3) The two arbitration proceedings were at various stage of progress. In the first proceeding the parties had completed the preliminaries and the arbitrator had set down the dates for the hearing. Whereas in the second proceeding the parties were still at the preliminary stage where the arbitrator was about to call for meeting to set the procedures for the arbitration proceedings. The two proceedings were going to be heard separately and independently. Therefore the applicant's contention that the arbitrator in the first proceeding was likely to be influenced by the events or evidence taking place in the second proceeding was most improbable and baseless. This argument could not be the basis to remove the first respondent as an arbitrator in the first arbitration proceeding even if there was a challenge to his fitness to act as one (see paras 26–27).

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(4) If a new arbitrator was appointed, the second respondent would have incurred additional costs to recommence the entire arbitration from scratch and further delay the second respondent's claim against the applicant. This would have prejudice the second respondent's position especially where the applicant was unable to adduce any proof that the first respondent was biased or lacked independence in the conduct of the first arbitration proceeding (see para 29).

[Bahasa Malaysia summary

Dua prosiding timbang tara dijalankan di hadapan penimbang tara yang sama ('responden pertama'). Prosiding timbang tara pertama ('prosiding pertama') adalah daripada responden kedua terhadap pemohon. Prosiding timbang tara kedua adalah daripada ATSA Architect Sdn Bhd ('arkitek') terhadap pemohon ('prosiding kedua'). Dalam prosiding pertama, responden kedua menuntut bayaran bagi kerja kontrak yang dilakukan untuk pemohon. Dalam prosiding kedua, arkitek menuntut bayaran profesional ke atas perkhidmatan yang diberikan kepada pemohon bagi kerja kontrak tersebut. Peguamcara arkitek tanpa berunding atau persetujuan daripada pemohon, telah menulis kepada Pengarah Pusat Timbang Tara Serantau Kuala Lumpur ('KLRCA') bagi tujuan melantik seorang penimbang tara menurut s 13(6) Akta Timbangtara 2005 ('Akta'). Pemohon kemudiannya memaklumkan KLRCA bahawa tidak terdapat sebarang persetujuan di antara pemohon dan arkitek untuk menimbangtara perkara di dalam prosiding kedua seperti yang dimandatkan di bawah s 29(i) Akta Arkitek. Pemohon juga memaklumkan KLRCA bahawa arkitek tersebut merupakan saksi utama dan terlibat secara langsung dalam prosiding pertama. Walau bagaimanapun, KLRCA tidak membalas surat pemohon dan terus melantik responden pertama tanpa pengetahuan pemohon. Responden pertama kemudiannya memfailkan penyataan kemerdekaan tetapi tidak mengisytiharkan penglibatannya di dalam prosiding pertama. Apabila Pengarah KLRCA menulis kepada pemohon untuk memaklumkan bahawa responden pertama telah dilantik sebagai penimbang tara, pemohon dengan segera membalas dan menulis kepada Pengarah KLRCA bagi membantah perlantikan tersebut. Sekali lagi tiada balasan yang diterima daripada KLRCA. Pemohon kemudiannya memfailkan usul ini menurut ss 11 dan 15 Akta bagi memecat responden pertama sebagai penimbang tara daripada prosiding pertama.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Sebelum mahkamah mempertimbangkan sama ada terdapat asas yang munasabah untuk memecat seseorang penimbang tara, pertamanya mestilah terdapat pertikaian mengenai kelayakan penimbang tara untuk bertindak. Pertikaian mestilah dibuat mengikut peruntukan s 15 Akta. Lebih-lebih lagi menurut s 15(1) Akta, penyataan bagi alasan-alasan pertikaian harus diserahkan kepada Tribunal Penimbang Tara. Dalam kes

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ini, tidak terdapat pertikaian mengenai perlantikan atau kelayakan responden pertama dalam prosiding pertama. Keseluruhan keterangan menunjukkan bahawa pemohon tidak gembira dengan perlantikan responden pertama sebagai penimbang tara dalam prosiding kedua. Oleh itu, aduan tersebut adalah mengenai responden pertama bertindak sebagai penimbang tara dalam prosiding kedua dan bukannya kelayakan responden pertama untuk menimbangtara dalam prosiding pertama. Tribunal seharusnya menentukan pertikaian tersebut. Ketiadaan pertikaian tersebut mengakibatkan tiada asas bagi permohonan ini. Oleh itu, permohonan tersebut adalah salah tanggapan (lihat perenggan 21–22).

(2) Pemohon mengadu bahawa tidak terdapat sebarang persetujuan untuk timbang tara di antara pemohon dan arkitek dalam prosiding kedua. Sekiranya benar, maka menurut peruntukan s 13(6) dan dibaca dengan s 15(2) dan s 18(1) Akta, pemohon seharusnya menulis penyataan bertulis kepada penimbang tara dan menghadiri perjumpaan awal yang dicadangkan oleh penimbang tara agar isu tersebut boleh diputuskan oleh penimbang tara. Ini tidak dilakukan oleh pemohon. Sebaliknya, pemohon mengemukakan aduan perlantikan responden pertama dalam prosiding kedua dengan menulis surat kepada KLRCA dan Pertubuhan Arkitek Malaysia. Langkah ini bukanlah langkah yang tepat bagi mempertikaikan perlantikan atau kelayakan responden pertama untuk bertindak sebagai penimbang tara dalam prosiding pertama (lihat perenggan 25).

(3) Prosiding kedua-dua timbang tara berjalan pada beberapa peringkat. Dalam prosiding pertama pihak-pihak telah menyempurnakan bahagian permulaan dan penimbang tara telah menetapkan tarikh-tarikh untuk perbicaraan. Sementara itu, dalam prosiding kedua-dua pihak masih lagi pada peringkat permulaan di mana penimbang tara akan mengadakan perjumpaan bagi menetapkan prosedur-prosedur bagi prosiding timbang tara. Kedua-dua prosiding akan didengar secara berasingan dan berkecuali. Oleh itu hujah pemohon bahawa penimbang tara dalam prosiding pertama berkemungkinan akan dipengaruhi oleh peristiwa-peristiwa atau keterangan yang berlaku di prosiding kedua adalah tidak munasabah dan tidak berasas. Hujahan ini tidak boleh dijadikan asas bagi memecat responden pertama sebagai penimbang tara dalam prosiding timbang tara pertama meskipun terdapat pertikaian mengenai kelayakannya untuk bertindak sebagai penimbang tara (lihat perenggan 26–27).

(4) Sekiranya penimbang tara baru dilantik, responden kedua akan menanggung kos tambahan untuk memulakan semula keseluruhan timbang tara daripada asal dan selanjutnya menangguhkan tuntutan responden kedua terhadap pemohon. Ini akan memprejudiskan

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kedudukan responden kedua terutamanya apabila pemohon tidak dapat mengemukakan sebarang bukti bahawa responden pertama berat sebelah atau tidak bersifat berkecuali semasa mengendalikan prosiding timbang tara yang pertama (lihat perenggan 29).] A

Notes B

For cases on revocation of appoinment, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1536–1537.

Cases referred to

Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656; [2010] 7 CLJ 785, CA (refd) C

Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor [1995] 5 MLJ 137, HC (refd)

Malaysia Steel Works (KL) Sdn Bhd v Kamseng Machine Works Pte Ltd [2003] 4 MLJ 697, CA (refd) D

Ng Chee Yew Sdn Bhd & Ors v IJM Corp Bhd & Anor [2011] 7 MLJ 122, HC (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Sineo Enterprise Sdn Bhd v Jayarena Construction Sdn Bhd [2005] MLJU 216, HC (refd) E

Legislation referred to

Arbitration Act 2005 ss 11, 13(3)(a), (6), 14(3), 15, 15(1), (2), 18(1), 40

Architect Act 1967 s 29(i) F

Rajan Navaratnam (T Gunaseelan with him) (Rajan Navaratnam) for the applicant.

Nahendran Navaratnam (Wong Wye Wah with him) (Kadir Andri & Partners) for the first respondent.

Edwin Lim (Edwin Lim Suren & Soh) for the second respondent (proposed intervener). G

Abdul Aziz Abdul Rahim J:

H

[1] There are two arbitration proceedings before the same arbitrator involving the same applicant. The first arbitration proceeding (the first proceeding) is between Preserver Bina Sdn Bhd as the claimant (the second respondent in this application) and the applicant as respondent. The second arbitration proceeding is between ATSA Architect Sdn Bhd as the claimant and the applicant as the respondent (the second proceeding). I

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[2] In the first proceeding, the second respondent/claimant is claiming for payment for a contract work done for the applicant. In the second proceeding, the claimant/architect is claiming for its professional fees for services rendered to the applicant for the said contract work.

[3] This application by the applicant is to remove the arbitrator (the first respondent) from sitting as arbitrator in the first proceeding and for a consequential order that Pertubuhan Arkitek Malaysia do appoint a substitute arbitrator.

[4] In his written submissions in encl 19, learned counsel for the applicant, Mr Gunaseelan submitted that while the first proceeding before the arbitrator is pending, the claimant ie the architect in the second proceeding (The claimant/architect), despite there being no formal or oral agreement entered into between the applicant herein and the claimant/architect concerned, had through their solicitors, Messrs Ernest Azad & Associates written to Lembaga Arkitek Malaysia ('PAM') to appoint an arbitrator purportedly to settle the claims between the claimant/architect and the applicant. PAM then requested the claimant/architect or their solicitors to furnish a copy of the professional service appointment letter of the claimant/architect concerned before an arbitrator could be appointed, as any reference of dispute for arbitration can only be way of agreement or consent. But the claimant/architect's solicitors did not furnish the letter required by PAM. Instead, the solicitors commented in their letter to PAM that, to furnish such appointment letter would only constitute unnecessary delay and prejudice to their client's right to promptly arbitrate. And therefore the claimant/architect's solicitors decided unilaterally that PAM was not able to appoint an arbitrator (see exh LWN3, encl 2). Thereafter the claimant/architect's solicitors wrote to the Director of Kuala Lumpur Regional Centre for Arbitration ('KLRCA') to appoint an arbitrator purportedly pursuant to s 13(6) of the Arbitration Act 2005 (see letter exh LWM4, encl 2). This request to KLRCA to appoint an arbitrator was done without consultation or approval of the applicant.

[5] The applicant herein then informed KLRCA, there is no agreement whatsoever between the applicant and the claimant/architect concerned to arbitrate the said matter in the second proceeding as mandated under s 29(i) of the Architects Act. The applicant also informed KLRCA that in the first proceeding, the claimant/architect in the second proceeding is a key witness and directly involved. KLRCA did not respond to the letter on the above matters that was sent by the applicant. KLRCA proceeded to appoint an

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arbitrator without any knowledge of the applicant. The arbitrator then (ie the first respondent herein) filed his statement of independence as in exh LWM7, encl 2. But the arbitrator did not declare his involvement in the first proceeding between the second respondent and the applicant in the first proceeding where he was also the arbitrator.

[6] When the Director of KLRCA wrote to the applicant on 21 April 2010 (letter at exh LWM10, encl 2) informing the applicant that the first respondent had been appointed as arbitrator, the applicant immediately responded and wrote to the Director of KLRCA objecting to the appointment. Again there was no reply from KLRCA. Subsequently, on 6 April 2010, the applicant wrote to the Director of KLRCA indicating that there was no reply to the applicant's earlier letter objecting to the appointment and also indicated that the Director of KLRCA had written to the claimant/architect's solicitors on the appointment without the applicant's knowledge.

[7] On 7 May 2010, the applicant wrote to Director of KLRCA (a letter, exh LWM14) stating the following:

(a) that KLRCA had unilaterally appointed an arbitrator (for the second proceeding);

(b) that the letter dated 21 April 2010 contains a missing page and had wrongly addressed the wrong legal entity;

(c) that KLRCA had usurped the powers of PAM;

(d) KLRCA ought to have understood that an official complaint was lodged against the claimant/architect concerned with PAM and proceedings were on going;

(e) the claimant/architect concerned is a key witness in the arbitration proceedings between the applicant and second respondent; and

(f) that KLRCA ought to first sort out the above technicalities and not prematurely implicate the first respondent as a neutral arbitrator.

[8] On 18 May 2010, the applicant informed the first respondent (see exh TDT44, encl 4) to refrain from further acting in the second proceeding, otherwise the neutrality of the first respondent to act as an independent arbitrator in the first proceeding is tainted and that if the first respondent was to proceed to act, then the applicant will be left with no choice but to proceed to remove the first respondent in so far as the on-going arbitration (ie the first proceeding) between the applicant and the second respondent is concerned.

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[9] Learned counsel for the applicant further submitted that the next act by the first respondent ie the arbitrator that shows that his impartiality or neutrality is tainted is that after receiving the applicant's letter of 18 May 2010, the first respondent had sent the said letter to the claimant/architect's solicitors Messrs Ernest Azad & Associates seeking their opinion wherein the first respondent had then accepted the explanation of the claimant/architect's solicitors (see exhs TDT45 and TDT46, encl 4). Then in another series of letters dated 20 May 2010 and 24 May 2010 and 16 June 2010 by the applicant to the respondents, the respondents reiterated the fact that the first respondent's appointment as arbitrator in the second proceeding was never with the consent of the parties and that, since the first respondent persisted in wanting to preside over the second proceeding, the applicant have no choice but to file this motion.

[10] The applicant's counsel submitted that there is a direct link of the second respondent's involvement in both proceedings as the claimant/architect concerned is a key witness in the first arbitration proceeding between the applicant and the second respondent and that the statement of independence by the first respondent is false and doubtful, etc, and the first respondent still refused to discharge himself and instead insisted on continuing on as an arbitrator in the second proceeding. In view of all that have happened between parties, the nature and tone of letters, the action taken by the first respondent in seeking views from the claimant/architect's solicitors, it cannot be denied that the applicant has in fact and in law lost all the confidence and trust as to the first respondent's position as an arbitrator and further based on the facts adduced herein above, there are serious concerns about the first respondent's impartiality and a real danger of bias, which the applicant is concerned will not give the applicant a fair and just proceedings to arbitrate. It was argued that it is certainly suspicious and doubtful as to why the first respondent still insists and is adamant that he should be the arbitrator in the second proceeding. This has raised serious concerns for the applicant as to the arbitrator's impartiality and competence to remain neutral in the first proceeding.

[11] It was submitted that s 13(6) of the Arbitration Act 2005 under which provision, the first respondent was appointed by KLRCA as arbitrator in the second proceeding has no application because there was never any agreement or consent to arbitrate between the claimant and the applicant in the second proceeding. The existence of an agreement to arbitrate is essential: *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656; [2010] 7 CLJ 785. In *Malaysia Steel Works (KL) Sdn Bhd v Kamseng Machine Works Pte Ltd* [2003] 4 MLJ 697 the Court of Appeal held that 'although the arbitrator was suggested by the parties, the respondent had objected to his appointment as arbitrator after the disputes had arisen. Thus the position was that there was no agreement between all the parties as to the appointment of an arbitrator'.

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Even the Director of KLRCA, Sundra Rajoo in appointing the first respondent in his own article titled *The Process of Arbitration in Resolving Sport Disputes* [2003] 4 MLJ cxlvii agree with this principle.

[12] In the case of *Sineo Enterprise Sdn Bhd v Jayarena Construction Sdn Bhd* [2005] MLJU 216 (unreported), Raus Sharif J (now FCJ) held that 'looking at the whole history of this matter, the second arbitrator has misconducted the proceedings by placing himself the autonomy to decide on the manner and procedure … in total disregard of the wishes of the parties … and therefore should withdraw as he is not more than an agreed instrument of the parties'. In *Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor* [1995] 5 MLJ 137, Nik Hashim J (as His Lordship then was) said that 'if an arbitrator is not impartial he should be disqualified and it does not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred. An arbitrator can be or perceived to be not impartial arising out of his conduct'.

[13] Raja Azlan Shah J (as his Highness then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 said ' … In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive …' The arbitrator also cannot adopt the views or advise of another as its own.

[14] It was submitted for the applicant that the court has inherent jurisdiction to make a declaration that the arbitration should not proceed, or to grant an injunction restraining arbitration if there are objections to the fitness of the arbitrator: *Ng Chee Yew Sdn Bhd & Ors v IJM Corp Bhd & Anor* [2011] 7 MLJ 122.

[15] In response to the above submissions by learned counsel for the applicant, Mr Nahendran for the first respondent submitted that the learned Justice Dato' Dr Hamid Sultan's decision in *Ng Chee Yew Sdn Bhd & Ors v MM Corporation Bhd Anor MM Construction Sdn Bhd* is a bad precedent to follow. There the learned judge exercised the court inherent jurisdiction to do justice over a matter which was not prayed for by the parties and not even pleaded. The decision was based on some averments by the parties in the affidavits. It was submitted that it cannot be that every time a party defends itself against attack or allegation by the other party that party is to be found at fault.

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[16] Secondly, the applicant is seeking to disqualify the first respondent as arbitrator in the first proceeding. But the applicant is complaining about the conduct of the arbitrator in relation to the second proceeding. There is no application to challenge the appointment or qualification or propriety of the arbitrator in the first proceeding. The first proceeding have progressed to the stage where parties are ready for hearing and hearing dates already fixed by the arbitrator.

[17] The arbitrator, in the face of the allegations against him, has done what he was supposed to do. He had written to the parties or their solicitors not to seek advice but to get their response on the allegations made. This is quite natural for him to do. He has to hear both sides before he makes a decision.

[18] The arbitrator ie the first respondent has explained his action and the events that have taken place in his affidavit in reply in encl 4. At para 51 of the affidavit jawapan of the first respondent in encl 4, the first respondent deposed that he had on 21 April 2010 sent a letter to both the applicant and the claimant/architect informing them that he had been appointed as the arbitrator in the second proceeding and he had scheduled a preliminary meeting on 7 May 2010. His letter of 21 October 2010 is exhibited as exh TDT34. However, the first respondent deposed in para 52 of the same Affidavit, that the applicant responded with a letter dated 22 April 2010 stating that the first respondent's appointment as arbitrator in the second proceeding was premature. Together with that letter, the applicant also attached his letter of complaint to the Director of KLRCA.

[19] In letter to the Director of KLRCA, the applicant alleged that the KLRCA had rushed into issuing the appointment letter to the first respondent for the second proceeding without reference to the applicant. Responding to the applicant's letter to the KLRCA, the first respondent deposed in para 54 of his *afidavit jawapan* that he wrote a letter dated 29 April 2010 informing the applicant that his appointment was under the Arbitration Act 2005 and that any issues which the parties may have regarding his appointment, may be raised in the preliminary meeting scheduled on 7 May 2010. In the same letter also, the first respondent requested the parties ie the applicant and the claimant/architect to confirm their attendance at the preliminary meeting. However, the preliminary meeting never took place. Firstly, it was deposed in the *afidavit jawapan* by the first respondent that both the applicant and the claimant/architect had asked for the preliminary meeting to be postponed for various reasons. Secondly, the proposed subsequent preliminary meeting was objected to by the applicant in the applicant's letter dated 18 May 2010 wherein the applicant had alleged that the first respondent had declared himself as the arbitrator in the second proceeding and suggested that the first

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respondent should stop being involved as arbitrator in the second proceeding. These facts can be seen at paras 61–62 of the *afidavit jawapan* of the first respondent.

[20] For the second respondent, Mr Edwin Lim the learned counsel for the second respondent submitted that the applicant failed to demonstrate in what way the first respondent will be bias or lack independence as arbitrator in the first arbitration proceeding by the mere presence of the architect of the project as witness in the first arbitration proceeding. It was also submitted that the mere presence of the claimant/architect as a witness in the first arbitration proceeding does not and would not cause the first respondent to be bias or lack independence as arbitrator. Further, it was submitted that this motion to remove the first respondent as arbitrator in the first arbitration proceeding was served on the second respondent two months before the hearing of the first arbitration proceeding; as a result thereof the first arbitration proceeding was abruptly stalled. Thus, it is the contention of second respondent that the applicant's action in filing this motion is purely to delay or thwart the original hearing dates of the first arbitration fixed in September and October 2010.

COURT'S FINDINGS

[21] This motion is made pursuant to ss 11 and 15 of the Act to remove the first respondent as arbitrator from the first proceeding ie the first arbitration proceeding. However the more relevant provision is s15 of the Act. The section provides as follows:

> 15 (1) Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.
>
> (2) Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall make a decision on the challenge.
>
> (3) Where a challenge is not successful, the challenging party may, within thirty days after having received notice of the decision rejecting the challenge, apply to the High Court to make a decision on the challenge.
>
> (4) While such an application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.
>
> (5) No appeal shall lie against the decision of the High Court under subsection (3).

[22] For the court to consider whether there is justifiable basis to remove an arbitrator from his or her seat to which he or her has been so appointed and mandated to discharge his or her duties in an arbitration proceeding as an arbitrator, there must first be a challenge to the arbitrator fitness to act as one.

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A And the challenge must be made in accordance with the provision of s 15 of the Act. More importantly under s 15(1) of the Act, a statement of the reasons for the challenge must be sent to the Arbitral Tribunal. In this instant case, the Arbitral Tribunal is a sole arbitrator in the person of the first respondent. However in this case, there is no challenge to the appointment or fitness of the B first respondent in the first proceeding. All the evidence shows is that applicant is unhappy that the first respondent has been appointed and has agreed to be the arbitrator in the second proceeding. Thus, the complaint was about the first respondent being arbitrator in the second proceeding and not the first respondent's fitness to arbitrate in the first proceeding. At the risk of repetition, C I reiterated that it is a requirement under s 15 of the Act that any party who intends to challenge an arbitrator shall within 15 days after becoming aware of the constitution of the Arbitral Tribunal or of any reasons referred to in sub-s 14(3) (and in this case sub-s 13(3)(a) is relevant) send a written statement of the reasons for the challenge to the Arbitral Tribunal. This is important because D under s 15(2) of the Act the Arbitral Tribunal 'shall make a decision on the challenge'. In this regard, it is pertinent to take note of s 18(1) of the Act which provides as follows:

E > 18(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

[23] In other words, it is for the tribunal to decide on the challenge. In the absence of such challenge, there is no basis for this application. I think the F application is misconceived.

[24] Reading the narrations of facts and events surrounding the appointment of the first respondent as arbitrator in the second proceeding as G deposed in the first respondent's *afidavit jawapan*, it is obvious that all along the applicant has been objecting to the first respondent's appointment in the second proceeding. There is no shred of evidence to show that the objection was directed at the first respondent's appointment as arbitrator in the first proceeding.

H

[25] There is no challenge to the appointment of the arbitrator in the first arbitration proceeding. The complaint is about the appointment and insistence of the arbitrator in the second proceeding. Complaints were raised with PAM and KLRAC as to the appointment of the first respondent as the arbitrator in I the second arbitration proceeding. But the applicant chose to stay away from the preliminary meeting scheduled by the arbitrator in the second arbitration where the application could have raised the objection under s 15 of the Act where challenge is to be made to the arbitrator and if not satisfied, the aggrieved party may go to court to raise the challenge again.

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[26] The appointment of the first respondent as arbitrator in the second proceeding was said to be made under s 13(6) of the Arbitration Act 2005. That provision reads:

> 13(6) Where, the parties have agreed on the procedure for appointment of the arbitrator —
>
> (a) a party fails to act as required under such procedure;
>
> (b) the parties, or two arbitrators, are unable to reach an agreement under such procedure; or
>
> (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,
>
> any party may request the Director of the Kuala Lumpur Regional Centre for Arbitration to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

[27] The applicant's complaint is that there is no agreement for arbitration between the applicant and the claimant/architect in the second proceeding. If that is so, then having regard to the provision of s 13(6) and read with s 15(2) and s 18(1) of the Act, the applicant should has sent a written statement to the arbitrator and attended the proposed preliminary meeting arranged by the arbitrator so that the issue can be decided by the arbitrator. In this case, this was not done by the applicant. Instead, the applicant raised the complaint of the appointment of the arbitrator ie the first respondent in the second proceeding by writing letters to KLRCA and PAM. In my view, this approach is not the correct approach to challenge the appointment or fitness of the first respondent to act as arbitrator in the first proceeding.

[28] It is true that there are two arbitration proceedings pending before the same arbitrator (the first respondent) ie the first and second proceedings involving the applicant as the respondent in both proceedings and the same arbitrator has been appointed as the sole arbitrator for both arbitration proceedings. However, the two arbitration proceedings are at various stage of progress. In the first proceeding the parties have completed the preliminaries and the arbitrator has set down the dates for the hearing of the dispute. Whereas in the second proceeding the parties are still at the preliminary stage where the arbitrator is about to call for meeting or conference of the parties to set the procedures for the arbitration proceedings. More importantly, though the same arbitrator is to arbitrate in both proceedings and involving the same respondent ie the applicant, and the subject matter may be overlapped to a certain extent because the claimant/architect in the second proceeding is very likely to be a material witness in the first proceeding, the two proceedings are

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going to be heard separately and independently. There is no application by either parties in the two arbitration proceedings for the two proceedings to be heard together or jointly. Moreover under s 40 of the Act, an arbitrator cannot direct any proceedings to be consolidated or to be heard jointly unless all the parties to the arbitration proceedings give their consent. Section 40 of the Act reads:

> 40(1) The parties may agree —
>
> (a) that the arbitration proceedings hall be consolidated with other arbitration proceedings; or
>
> on such terms as may be agreed.
>
> (b) that the concurrent hearings shall be held,
>
> (2) Unless the parties agree to confer such power on the arbitral tribunal, the tribunal has no power to order consolidation of arbitration proceedings or concurrent hearings.

[29] Therefore the contention by the aplicant that the arbitrator in the first proceeding is likely to influence by the events or evidence taking place in the second proceeding is most improbable and baseless. This argument cannot be the basis to remove the first respondent as an arbitrator in the first arbitration proceeding even if there is a challenge to his fitness to act as one.

[30] Having regard to the facts and circumstances surrounding this application, I agree with the submissions by the learned counsel for the second respondent that to allow the application will contribute to additional costs and delay in the arbitration proceedings. The second respondent had incurred costs in the first arbitration proceeding and has filed all the necessary cause papers and exchanged documents with the applicant for the past one year.

[31] If a new arbitrator is appointed, the second respondent will incur additional costs to re commence the entire arbitration from scratch and further delay the second respondent's claim against the applicant. This would certainly prejudice the second respondent's position especially where the applicant is unable to adduce any proof that the first respondent was bias or lack independence in the conduct of the first arbitration proceeding.

[32] On the above reasons, the plaintiff's application in this originating motion in encl 1 is dismissed with cost of RM20,000 to each respondent to be paid by the applicant.

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Plaintiff's application dismissed with costs.

Reported by Kanesh Sundrum